
(1960) 08 AP CK 0008

In the Andhra Pradesh High Court

Case No : Letters Patent Appeal No. 98 of 1959

Kumarisetti Suryaprakasa Rao

APPELLANT

Vs

Kumarisetti Venkata Lakshmidevi

RESPONDENT

Date of Decision : 02-08-1960

Acts Referred:

Citation : AIR 1961 AP 404

Hon'ble Judges : P. Chandra Reddy, C.J.;Jaganmohan Reddy, J

Bench : Division Bench

Advocate : Advocate General and I. Rangacharya, for the Appellant; M.S. Ramchandra Rao and M. Krishna Rao, for the Respondent

Final Decision : Dismissed

Judgement

Chandra Reddy, C.J.—This is an appeal against the judgment of our learned brother, Sanjeeva Row Nayudu, J., under Clause 15 of the Letters Patent.

2. The appellant is the husband and the respondent is his wife. The marriage between them took place on 26th February, 1948. At that time, the respondent was a minor being about fourteen or fifteen years old, while the appellant was about twenty four years old. After the marriage, the respondent lived with her husband, the appellant, at Kakinada, Masulipatam etc., in which places he was working as a Sub-Inspector of Excise.

On 5th March 1949, the respondent's father took the respondent from her husband's house with the latter's consent to Tirupathi. After they performed the pilgrimage to Tirupathi, the respondent did not rejoin her husband. Instead, acrimonious correspondence followed subsequently between the respondent's father and the appellant in regard to jewels presented to the respondent by the appellant and rendition of accounts of the income derived from the properties gifted to the respondent by her father.

Throughout the correspondence from March 1949 to October 1949, while the appellant was insisting upon his wife being sent back with the jewels which he

presented to her at the time of the marriage and the submission of a correct and proper account by the father of the income from the lands and the house which he gifted to the respondent, the respondent's father was asserting that his daughter was being illtreated in his house, that the jewels were taken away from her at the time when she was taken to Tirupathi and that the appellant, the husband, should change his attitude towards his wife and create conditions in his home favourable for a happy life for both of them. The charges and counter-charges made by the appellant and his father-in-law were denied in the letters written by the one to the other.

We may refer to the last letter written by the father-in-law to the appellant on 26th February 1950, Ex. B.6. It was there recited, inter alia, that the respondent's father had clearly written to the addressee (the appellant) that the girl (respondent) was desirous of living with him provided he also desired such a thing and made it possible and that the very fact that the husband required his wife to go to him with the jewels of which he and his mother had already deprived her only showed his insincerity. The father-in-law also charged the son-in-law with his strange attitude in that he required his wife to give in writing as to whether she desired to live with him or not

3. There was no reply to this and nothing further seems to have been done till 1951 when it is said that, at the request of the respondent's father, D.W. 3, a retired Government servant, intervened to induce the appellant to take back his wife. But nothing seems to have come out of it and the respondent filed a suit for maintenance from her husband alleging cruelty and forcible deprivation of her jewels etc.

4. The suit was defended on the plea that the defendant (appellant) was not guilty of any cruelty but, on the other hand, the plaintiff (respondent) left his home voluntarily at the instance of her father and that, consequently, she was not entitled to any maintenance.

5. The trial court, agreeing with the defence that the defendant (appellant) did not treat his wife cruelly, that the jewels were not taken away by him from his wife and that she was guilty of deserting her husband, dismissed the suit with costs.

6. Pending an appeal preferred by the respondent against the decree the appellant presented a petition u/s 5 (1) (c) of the Madras Hindu (Bigamy Prevention and Divorce) Act (VI of 1949) for dissolution of his marriage with the respondent alleging that she had without just cause deserted him for a continuous period of not less than three years immediately preceding the presentation of the petition.

7. In answer to this, the respondent asserted that it was not she that abandoned the appellant but it was the appellant that deserted her and that she was always ready and willing to go back to him. In the course of evidence, the respondent categorically declared her intention to return to her husband unconditionally

while the appellant refused to take her back with the same emphasis.

8. The Additional District Judge, who heard the appeal as also the petition for divorce, dismissed the appeal and granted a decree nisi for dissolution of the marriage in the view that the wife lived away from her husband from 5th March 1949 onwards and that the case of ill-treatment of the wife in her husband's home during the 1st period of her stay there was not made out. The learned Judge thought that, as a result of rejecting the case of the wife as to ill-treatment and her living away from her husband from 5th March 1949 in consequence thereof, it followed that she voluntarily and wilfully resided away from the appellant and thus furnished a ground for entering judgment in favour of the appellant.

9. Dissatisfied with this decision, the respondent preferred C. M. A. No. 162 of 1957 in this Court. Sanjeeva Row Nayudu, J., who heard the appeal, found that there was no desertion by the wife which would afford a ground to the husband to sustain a petition for divorce. He concluded that there was no animus on the part of the wife to desert her husband for the requisite period of three years as he did not find in the documents filed with the petition any indication that the wife refused to go back to her husband's home. In the result, the learned Judge allowed the appeal and dismissed the petition for divorce under S. 5(1)(c) of Madras Act VI of 1949. It is this decision that is now under appeal.

10. The only question that arises for consideration in this appeal is whether the view of our learned brother as to the intention of the wife to live away from her husband so as to put an end permanently to her cohabitation with him is correct. At the outset, it must be remembered that when the respondent was taken by her father, she could not be said to have deserted her husband for the reason that it was done with the consent of the husband. For the act of desertion, both the factum of separation and the intention to separate must be present.

In this case, as we have already stated, when the wife left the husband's home, animus deserendi could not be attributed to her. But such animus can supervene even after she left without the requisite intention to leave her husband. Thus, a wife, who left her husband without any intention of deserting him at that time, might become guilty of desertion later on by indicating the animus to live away from him.

11. The question for consideration in this case is, has she -- and if so, when did she manifest, -- the animus deserendi? So far as the respondent was concerned, at no point of time had she declared her intention to live away from her husband.

11-A. Reliance is placed by the learned counsel for the appellant on Ex. B.6, dated 26th February 1950, to which reference had already been made and in which certain conditions were laid down for the respondent re-joining her husband. We do not think that this document serves the purpose for which it is called in aid by the appellant. Apart from the question whether there is anything in this letter to establish a refusal on the part of the father to send back his

daughter to her husband, that cannot have the effect of attributing an intention on the part of the wife to desert her husband. As already observed this letter was written by the father and not by the respondent. It is asserted by the appellant that letters were written by the father at the instance of his daughter, as could be gathered from Ex. B.4 wherein it was said :

"..... my daughter is fully conversant with the correspondence that has passed between us and in fact all that I wrote to you till now (including the ill-treatment and retention of jewels by you) was only done on the strength of the information furnished by her to me and at her instance."

12. In this connection, we should bear in mind that this recital was evidently inserted as an answer to the charge that it was the father that was responsible for keeping away the respondent from her husband. Secondly, this cannot be treated as a statement made by the respondent that she was unwilling to go back to her husband. It is significant that neither the appellant had stated that all the letters were written by the respondent's father at her instance and with her consent; nor was any such suggestion made to her while she was in the witness-box.

It is also interesting to note that there is not even a suggestion in the petition that the wife was unwilling to live with her husband or had refused to live so and that she voluntarily and without any just cause continuously resided away from the husband. On the other hand, it is specifically asserted that the respondent was removed by her father from his house and that she was not sent back.

Beyond stating that the respondent was living away from the appellant since 6th March 1949 without just cause and that she deserted the appellant since that date, there is no averment that after she was taken to Kakinada for the purpose of making a pilgrimage to Tirupathi, she developed the animus deserendi and that thereafter throughout the relevant period she remained unwilling to go back to her husband. The recital in the petition was that the respondent was removed from the appellant's home on 6th March 1949 and that no attempt was made by her parents to send her back to him, nor did the respondent make an attempt to come and live with the appellant.

13. In this connection, we cannot overlook the letter, Ex. A-4, written by him on 10th October 1949 which, in our opinion, militates very much against the theory of the wife's unwillingness to rejoin her husband. It was inter alia stated there by the appellant :

"Specifically I have nothing in particular to blame my wife. She has become only a mild victim to the dictates of you and your wife. She is helpless, and is only a tool in the hands of her parents. I could see that she is behind the bars of your commands preventing her from coming to my house."

14. Subsequently, nothing has happened to enable the appellant to change his attitude towards his wife. Nor is our attention drawn to any document or

circumstance which can point to the conclusion that the wife was really unwilling to live with her husband. Par from there being such a circumstance, the material on record established that while the wife was anxious to return to her husband's home, it was the husband that was unwilling to take her back. D.W. 3 has testified to his having intervened as a mediator in the dispute between the parties along with some other people. He deposed that the respondent was prepared to go and live with the appellant "giving up all the disputes" and that she should be taken back to his house but the appellant and his father stated that the mediators "could intervene in any other matter except this". This indicates that the appellant spurned the offer of the respondent to come back and live with him. It is true that he is distantly related to the respondent but that is not a ground for rejecting his deposition, since there is nothing in the evidence to impeach his veracity. His evidence also is consistent with what transpired later on.

15. In the evidence given by the respondent in this proceeding, she stated :

"I never told my husband at any time that I would not join him and live with him, "I am prepared to join my husband unconditionally."

16. In contrast to this, the appellant stated in his evidence that ho was not prepared to take . her back. Further, the respondent deposed that she wrote some letters to her husband requesting him to take her back to him but there was no response from him to these letters. It also appears from her evidence that she caused a notice issued to the appellant before she filed the maintenance suit calling upon him to take her back to his house, or in the alternative, to provide for her maintenance. This was elicited in the cross-examination and there was no evidence contra on the side of the appellant.

17. In these circumstances, the inference is inescapable that it was not the respondent that was anxious to reside away from the appellant. Indisputably, it is for the person who seeks divorce to establish the two elements, namely (i) the factum of separation, and (ii) an intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly, two elements are essential so far as the deserted spouse is concerned; namely (i) absence of consent on his or her part and (ii) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. (*Vide Bipin Chander Jaisinghbai Shah Vs. Prabhawati, .*

As we have already stated, no significance need be attached to the factum of separation, since it was with the permission of the appellant that the respondent was taken by her father to Tirupathi. The appellant has not proved in this case the intention on the part of his wife to bring cohabitation permanently to an end. On the other hand, the surrounding circumstances indicated above can only lead to the conclusion that it was the appellant that was unwilling to take back his wife, which it is unnecessary for us to ascertain In this case. Whatever might be the cause for the misunderstandings between the appellant and his father-in-law,

there is nothing on record or in the attendant circumstances to warrant an inference that the wife desired to reside away from her husband and that her separate living was attributable to an animus deserendi.

18. The learned Advocate-General for the appellant relied on the institution of the suit by the wife for separate maintenance and invited us to hold on the basis of the suit that the respondent had the intention to live away from her husband. We do not think that the filing of the suit renders much assistance to the appellant. For one thing, the respondent explained as to why she instituted the suit, by stating that it was due to the refusal on the part of her husband to take her back.

19. Assuming that this would afford some clue as to her intention to desert her husband, that was within two years of the presentation of the petition for dissolution of the marriage, Nor does her statement in the witness-box in the maintenance suit that she would not go back to her husband as long as she lived with his parents help the appellant because that was made on 19th January 1953, a few months before the Original Petition giving rise to this appeal was filed.

20. In order to sustain a petition for dissolution of marriage, there must be separate living with the animus deserendi for a period of three years, and there must be proof that throughout the whole course of three years the deserted spouse had deserted the other. Further, in order to succeed in the petition for divorce by the husband, he should establish that he was always willing to fulfil his own marital obligations. We have indicated earlier that in this case the husband was unwilling to take back his wife.

21. For these reasons, we must hold that the appellant could not successfully impugn the finding of the learned Judge that the wife had no intention of permanently terminating all relations with her husband. We may point out that the Additional District Judge, who accepted the petition for divorce, proceeded on the assumption that the desertion started on 5th March 1949 when the respondent was taken by her father to Kakinada and subsequently when she stayed away from her husband's home without reasonable and just cause, overlooking the fact that the respondent's departure from her husband's home in March, 1949 was with the consent of her husband and, therefore, it could not constitute "desertion" within the meaning of Section 5 (1) (c) of Act VI of 1949.

It is for this reason that he failed to consider as to when the animus deserendi started. It is also worthy of note that the petition for dissolution of marriage has given 5th March 1949 as the date on which the cause of action has arisen. In other words, it proceeds on the assumption that the desertion started on that date which position is untenable for the reasons stated above. It is not alleged in the petition that the animus to desert her husband was developed subsequently etc. Therefore, the attempt to rely on Ex. B-6 is merely the result of an after-thought and it cannot be countenanced, apart from that document not affording

any help to the appellant.

22. The District Judge also did not take into account the evidence of D.W. 3 which, as already stated, would have considerably helped him in coming to the conclusion as to who exactly was guilty of desertion in this case.

23. In the circumstances, we think that the conclusion arrived at by our learned brother is right and the judgment under appeal has to be up held- In the result, the appeal is dismissed. The respondent's counsel does not press for costs stating that his client is very anxious that she should live amicably with her husband.